STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

October 5, 1995

Re: 92-0400

Dear Sir/Madam:

Enclosed is a certified copy of the Order entered by this Commission.

Sincerely,

Donna M. Caton

Donna M. Caton
Chief Clerk

Enc.

527 East Capitol Avenue, P.O. Box 19280, Springfield, Illinois 62794-9280

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

AAA Coin-Phones & Systems, Inc., ADCOM Teleservices, Inc., American Coin Telephone, Inc., American Pay Telephone Corporation Automated Coin-Phone & Telephone, Ltd., BMI, Inc., Dial Com Systems, Express Telephone Systems, Inc., Federal Phone Company, Fox Valley Publicfax Fone, Inc., Herschel's Coin Communications, Highland-Midwest Communications, Inc., Illinois Pay Telephone Company, Illinois Public Telephone Inc., J.B. Tel Company, L.S. Enterprises, Inc., Liberty Telephone Company, Inc., MAAC, MARC W. White d/b/a Make a Call, Metro Payphone Services, Inc., Metrotel Communications, Northwestern Communications, Inc., NU-Way Communications, Inc., Pace Telecommunications, Inc., Payphone Marketing Systems, Inc., Payphones Plus, Inc., Private Payphones, Inc., Public Payphones, Inc., Public Telephone Corporation, SCS Telecom, Inc., Sheffield Systems, Inc., Siebert Enterprises, Incorporated, Town & Country Telephone Company, World Communications, Inc.	:	92-0400
-vs-	:	
American Telephone and Telegraph Company, AT&T Communications of Illinois Inc., MCI Communications Corporation, and Sprint Communications Company L.P., d/b/a Sprint Communications L.P.	:	
Complaint for just and reasonable compensation for billable operator, 800, 900 and 700 service calls.	:	

ORDER

By the Commission:

On October 23, 1992, AAA Coin-Phones & Systems, Inc., et al., ("Complainants") filed the instant complaint against American

Telephone and Telegraph Company, AT&T Communications of Illinois, Inc. ("AT&T"), MCI Telecommunications Corporation ("MCI"), and Sprint Communications Company L.P., d/b/a Sprint Communications L.P. ("Sprint") seeking just and reasonable compensation for billable operator, 800, 900 and 700 service calls. (Hereafter, AT&T, MCI and Sprint will be referred to as "Respondents" and, where necessary, they will be identified separately.) In addition to the complaint, a motion for interim compensation was filed by Complainants. Said motion was later denied by the Hearing Examiner.

Pursuant to the law and the rules and regulations of the Commission, this matter came on for hearing before a duly authorized Hearing Examiner of the Commission at its offices in Chicago. A petition to intervene was filed by Progressive Controls, Inc. on December 13, 1993, and that petition was later denied by the Hearing Examiner. Various status hearings were held on this matter, and evidentiary hearings took place on July 12 through 15, and August 1 and 2, 1994. Complainants, each Respondent and the Staff of the Commission appeared by counsel and presented testimony and exhibits in support of their respective positions. The following witnesses testified during the course of this proceeding: Martin Segal, President of Public Communications Consulting, Inc., who testified on behalf of all the Complainants; Edward Phelan, Staff Director, Regulatory Affairs, for Sprint; Dennis Ricca, a Senior Policy Advisor for Regulatory and Legislative Affairs for MCI; Richard Sheer, Staff Manager, Consumer Communications Services, for AT&T; and Peggy Rettle, an economic analyst, for the Commission Staff. In addition, a representative for each of the Complainants presented testimony. At the conclusion of the hearing on August 2, 1994, the record was marked "Heard and Taken."

A briefing schedule for this matter was established and the final reply brief was filed on February 17, 1995. Subsequently, a Hearing Examiner's Proposed Order was served on the parties and exceptions were filed thereto. Said exceptions are considered herein.

On August 8, 1995, the Commission sitting en banc heard oral argument and took this matter under advisement.

I. INTRODUCTION

This matter is a case of first impression for the Commission. It concerns billable operator service calls made from Complainants' payphones, and whether Complainants should be compensated for such calls. Billable operator service calls include calls where an end user dials 10XXX, 950, 1-800 or some other form of access to reach an operator service provider ("OSP") other than the OSP presubscribed to the payphone.[1] (For purposes of this Order, such calls will be referred to as "dial-around calls." Where necessary, retail 1-800 calls will be identified separately.) Currently, Complainants are not compensated for intrastate dial-around calls.

The impetus for this complaint stems from the enactment of Section 13-510 of the Public Utilities Act (the Act"). Effective May 14, 1992, Section 13-510 provided:

> Any telecommunications carrier using the facilities or services of a payphone provider shall pay the provider just and reasonable compensation for the use of those facilities or services to complete billable operator services calls and for any other use that the Commission determines appropriate consistent with the provisions of this Act. The compensation shall be determined by the Commission subject to the provisions of this Act. This Section shall not apply to the extent a telecommunications carrier and a payphone provider have reached their own written compensation agreement.

Needless to say, none of the Complainants has entered into a compensation agreement with the Respondents. Complainants, however, cite the above language to support their assertion that compensation for dial-around calls is required.

II. SECTION 13-510

All parties to this proceeding agreed that Section 13-510 is applicable herein. As the case progressed the focus turned to three issues: 1) what level of compensation, if any, is "just and reasonable" for purposes of this section; 2) if necessary, what method of compensation is appropriate; and 3) whether any retroactive compensation was required.

III. METHOD OF COMPENSATION

Assuming that Complainants are entitled to compensation under Section 13-510, the focus turns to what is the appropriate method for compensation. Three methods were advanced: per minute, per call and per phone compensation. The record demonstrates that parties concurred that at this time per call compensation was the superior method. The problem, though, is whether the per call method is technically feasible at this time.

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[1] For purposes of this order, all forms of billable operator services calls relate only to intrastate calls.

Sprint agrees that the per call method is the best method for determining compensation. Sprint notes, however, that tracking and counting dial-around calls is a labor-intensive process. At this time, it does not have an automated system in place to count accurately the number of dial-around calls made from each payphone. In light of this fact, Sprint asserts that until such time as an automated system is developed and implemented, Sprint should be allowed to bill the Complainants for its costs in counting the number of dial-around calls.

AT&T likewise submits that it does not have a tracking system in place to count dial-around calls. AT&T also asserts that in the event the Commission orders compensation, Complainants should be required to compensate AT&T for the costs of implementing a tracking system.

While it did not address this issue in its brief, the record also demonstrates that MCI currently does not possess an automated system to allow for per call tracking. (Tr. 1570-71)

Staff asserts that per call compensation is preferable, as soon as the tracking of such calls can be implemented by the Complainants. Staff argues that the Complainants have proffered no evidence or persuasive arguments as to why the Respondents should bear the burden of tracking dial-around calls. At a minimum, Staff contends that the Complainants should bear some of the costs of implementing the per call compensation method.

If per call compensation is not feasible at this time, Staff recommends that the Commission adopt a total per phone compensation to be paid by Respondents ratably based upon each Respondent's share of the total number of intrastate dial-around calls. Staff does emphasize that per phone compensation should be used only on an interim basis until such time as the tracking of either per call or per minute compensation can be implemented.

In reply to these arguments, the Complainants continue to argue that the Respondents have the ability to track both retail 1-800 and billable operator service calls from payphones. They reiterate that if compensation is granted, the appropriate method is on a per call basis.

Commission Conclusion

It is readily apparent that per call compensation is the most reasonable and equitable method for compensating payphone providers for dial-around calls at this time. Ideally, per minute compensation would come closest to properly ascribing the appropriate measure of compensation. From this record, however, it appears that the ability to track calls on a per minute basis does not exist. Accordingly, the Commission believes that the per call method of compensation provides the most equitable method for awarding compensation.

Under such a method, Respondents are compensating Complainants for calls actually completed rather than basing compensation on estimates. In this way, both Complainants and Respondents are assured that compensation paid and received is based on a true measure of usage.

With respect to Respondents' ability to track on a per call basis, the Commission concurs with Complainants' assessment of the situation. MCI raised no objection to the per call tracking method, so the Commission concludes that MCI can track such calls, with one exception. Evidently, MCI cannot track its 950 calls. Consequently, an accommodation for such call will need to be made, in the form of a per phone compensation level. If and when MCI develops the ability to track such calls, these calls will be compensated for on a per call basis.

Sprint, meanwhile, advocates the use of the per call method. While it notes that tracking calls in such a manner is a labor intensive task Complainants, through the testimony of Mr. Segal, are willing to accept Sprint's records with respect to these calls and do all the counting and processing work. In this way, Sprint would incur little, if any, cost for tracking the number of intrastate dial-around calls completed.

Finally, AT&T appears to have the ability to implement a per call tracking system, and may have done so already for interstate dial-around calls. Therefore, the Commission is of the opinion that Complainants should not pay for the development and implementation of a system that is substantially similar to the one already in use.

IV. THE PROPER LEVEL OF COMPENSATION

The issue which garnered the most attention in this proceeding was the proper level of compensation for the Complainants. Indeed, the spectrum of positions ranged from $0.00 per call to $0.85 per call for billable operator service calls. The following summarizes the various positions presented to the Commission.

A. Complainants

Complainants argue that the proper level of compensation must be based on market factors in the payphone and telecommunications industry. This argument is based, in part, on the fact that the

Complainants offer competitive services, as found by the Commission in its Order in Docket 84-0442, entered June 11, 1986. In addition, Complainants assert that the Respondents are providing a competitive service as well and price these services based upon market value.

Complainants' witness Segal discussed a number of proposals for calculating the market value of the use of payphones in completing billable operator service calls. These include:

1) $0.95 - the effective AT&T coin surcharge which AT&T charges its end users that place billable operator service calls from payphones through the use of coins. This surcharge is $0.95 per call greater than the surcharge imposed on calling card calls;

2) $0.78 - under the foregoing proposal, AT&T compensates the independent payphone provider with 35% of the revenue generated from the payphone. By multiplying AT&T's minimum tariff rate for a three-minute coin call, $2.22, by 35%, one arrives at the $0.78 figure;

3) $0.60 - this figure is based upon the Illinois Bell Telephone LRSIC studies in evidence in Docket No. 88-0412;

4) $0.57 - this figure is based upon the compensation paid by MCI to payphone providers from access code billable operator service calls;

5) $0.48 - this figure is based upon the market level of compensation paid by most OSPs. Generally, compensation is between 20%-30% of gross revenues. According to Mr. Segal, this figure is at the lower end of the range of compensation;

6) $0.43 - citing the testimony of Sprint witness Phelan, he based this figure on a reduction of commission of 2% from what a presubscribed OSP is paying. Again, Mr. Segal states that this figure is at the lower end of the range of compensation.

In the end, Complainants advocate that billable operator service calls be set at $0.85 per call. This number is achieved by taking the rounded median value of proposals 1 and 2 above.

With respect to retail 1-800 calls, Complainants state that the Commission would be justified in setting a different level of compensation. Complainants cite to the fact the revenue generated, and the structure of prices to end users, differ significantly from billable operator service calls so as to warrant a different level of compensation. Based upon cost information provided by Mr. Segal, Complainants contend that retail 1-800 calls should be set at $0.33 per call.

Complainants assert that awarding such compensation will have little, if any, effect on Respondents' end user rates. Complainants cite that MCI, in certain circumstances, may be paying certain payphone providers $0.85 for presubscribed traffic. Complainants conclude that if MCI's price structure already has provided for compensating presubscribed traffic, then there is no reason to believe it could not stand the similar level of compensation to other payphone providers.

Complainants assert that compensating payphone providers for the use of their facilities should have the effect of decreasing prices for other operator services provided at a payphone. This reasoning is based on the argument that with a broader base of traffic bringing revenue to cover costs, it will place downward pressure on other payphone prices.

Finally, in response to criticisms from the other parties in this proceeding, Complainants presented a cost study which was prepared by Mr. Segal. This information was presented as supplemental rebuttal testimony. (Segal Ex. 4.0) He utilized financial and business information from three of the Complainants for the purposes of calculating the cost of a dial-around call.[2] These three companies operate over 1,850 payphones. Mr. Segal testified that these companies were chosen based on their size and geographic location.

Based on actual accounting cost information supplied by the companies in the study, he analyzed the costs either on an annual basis, for companies A and B, or on a monthly basis for company C. Because Complainants' payphones do not have the ability to track either non-presubscribed calls or retail 1-800 calls, the number of such calls had to be estimated. Based upon his calculations, Mr. Segal concluded that Complainants' costs are approximately $0.33 per call.

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[2] For purposes of Mr. Segal's analysis, the companies are referred to as A, B and C. This demarcation is due to the proprietary nature of the information provided.

B. Sprint

Initially, Sprint states that any compensation for Complainants must be based on cost, not market value. Sprint cites to a portion of Section 13-510 which provides in pertinent part that "[t]he compensation shall be determined by the Commission subject to the provisions of this Act." Using this language, Sprint argues that the provisions of the Act, specifically Section 1-102, require services to be based on cost.

In addition, Sprint cites to Section 13-103 which provides that:

> competition should be permitted to function as a substitute for certain aspects of regulation in determining, among other things, price of telecommunications services, but only when consistent with the protection of consumers of telecommunications services and the furtherance of other public interest goals.

Sprint contends that the preponderance of evidence in this case demonstrates that competition will not protect it from the "ridiculously high rate" Complainants seek, nor will public interest goals be furthered by the market-based prices.

Sprint notes that every witness in this proceeding, except Mr. Segal, testified that compensation should be cost-based. Sprint witness Edward Phelan testified that compensation should be based on the payphone providers' incremental costs. In this instance, however, Sprint asserts that the Complainants have not proven that they incur any incremental costs for dial-around calls.

Sprint also cites to the testimony of Staff witness Peggy Rettle. Ms. Rettle also testified that compensation should be based upon cost. As discussed herein, Ms. Rettle recommended that Complainants receive $0.05 per call, or $1.50 per phone per month. Sprint contends that in light of Complainants' failure to identify any long-term cost caused by the Respondents or dial-around calls, it believes that $0.05 per call would be more than just and reasonable compensation.

As to the cost calculations prepared by Complainants' witness Segal, Sprint urges the Commission to reject those figures in their entirety. Sprint points to the fact that Mr. Segal has never performed a cost study and has no accounting or economics background. Moreover, the costs Mr. Segal identified are not costs caused by any of the Respondents. Rather, such costs are fixed and are not impacted by the number of dial-around calls. Finally, Sprint contends that Mr. Segal's costs come from unaudited and unsubstantiated financial information and volume estimates, including information gained from a company which is not part of the cost study. For these reasons, Sprint contends that the Commission cannot responsibly base its decision on Mr. Segal's cost analysis.

With respect to retail 1-800 calls, Sprint argues that no compensation should be awarded and presents several reasons. First, Sprint asserts that Complainants have failed to prove that retail 1-800 calls carried by Respondents cause them to incur any costs. Second, payphone providers have never had retail 1-800 service offerings and have no competing retail 1-800 type service. Third, payphone providers receive compensation from their coin and coinless default operator service. Due to the fact that retail 1-800 calls do not impact either coin or coinless payphone services, such compensation should be denied.

In addition to those reasons, Sprint also asserts that no regulatory commission ever has ordered compensation for retail 1-800 calls. Among those commissions denying compensation for these calls is the FCC.

C. AT&T

AT&T first argues that the Commission should not award compensation for retail 1-800 calls. Among its reasons, AT&T points out that Section 13-510 does not specifically provide for the compensation of such calls. AT&T also asserts that it is unable to determine whether a retail 1-800 call originates from a payphone because its systems do not track such information: Complainants do not have the ability to track such calls either.

Like Sprint, AT&T also contends that a retail 1-800 call would not have been handled by the payphone provider's presubscribed OSP. Therefore, such calls do not dial-around the presubscribed OSP, and the payphone provider is not being deprived of revenue.

AT&T also cites to the FCC decision and the Florida PSC decisions which rejected requests to compensate for retail 1-800 calls. See CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rulemaking; Florida PSC Docket No. 920399-TP.

With respect to billable operator service calls, AT&T argues that the Commission should reject the use of a market value analysis to set the compensation level. As to Mr. Segal's six proposals previously set forth, AT&T contends that proposals 3 through 6 are based on unsubstantiated information. AT&T asserts that the piece of information at issue, Mr. Segal's calculation of

AT&T's average revenue per billable operator services call, is as unreliable as it is irrelevant.

AT&T first states that the information is irrelevant because the focus should be on Complainants' costs, not Respondents' revenues and costs. Regarding the reliability of the information, AT&T notes that Mr. Segal used two companies that receive compensation from AT&T. Yet, he did not identify the time period for which revenue was tracked, nor did he identify whether the revenue included both dial-around and 0+ calls. Moreover, AT&T states that one of these companies, Federal Phone Company, had its Certificate revoked by the Commission on May 4, 1994, for failing to file annual reports. In sum, AT&T urges the Commission to reject proposals 3 through 6 as unreliable.

As to proposals 1 and 2, AT&T likewise urges that the Commission reject the analysis. AT&T asserts that these proposals are based on rates for coin sent-paid calls. Such a call, AT&T argues, is markedly different than a dial-around call. With a sent-paid call, the payphone owner collects the monies deposited into the phone. Meanwhile, a dial-around call is not billed to the payphone.

D. MCI

MCI initially asserts that Complainants are entitled only to just and reasonable compensation under Section 13-510. Under the language of that section, MCI states, the Commission is the sole arbiter as to what is a just and reasonable level of compensation.

MCI argues that, this being a case of first impression, the Commission determination of what is "just and reasonable" compensation should begin with how the Commission and courts have applied that term with respect to other sections of the Act. Citing as authority Champaign County Telephone Company v. ICC, 37 Ill.2d 312 (1967), MCI contends that the applicability of the just and reasonable standard extends to a complaint case where compensation for the use of facilities was requested. MCI asserts that; based upon the Champaign County Telephone case, the standard for the just and reasonable level of compensation is Complainants' intrastate incremental costs incurred as a result of dial-around calls.

MCI further argues that the Complainants have the burden of proof of establishing a just and reasonable level of compensation. Id. Concerning the testimony of Complainants' witness Segal, MCI joins with Sprint and AT&T in asserting that Mr. Segal's cost study should not be given any weight due to his lack of training or experience in the area. In addition, MCI points to a number of problematic calculations and assumptions found in Mr. Segal's cost study, including the use of information from a fourth company which was not part of the cost study. MCI asserts that, absent any credible testimony to support Complainants' position, they have failed to meet their burden.

E. Staff

Like the Respondents, Staff argues against the acceptance of Complainants' market value compensation approach. Section 13-510, Staff states, refers to compensation to be paid payphone providers for the use of their facilities, not rates in the sense that rates are contemplated elsewhere in the Act. Staff argues that such a distinction is important because it differentiates the Complainants from the Respondents with regard to whether they are deserving of uniform treatment.

Staff contends that the service Complainants are providing is not similar to the service offered by Respondents. Staff submits that the Complainants' facilities and services at issue herein do not allow the customer, the Respondents, simply to refuse to use Complainants' allegedly competitive services. Rather, it is the end user customer who determines whether the Complainants' facilities and services will be employed.

To illustrate further, Staff offers another example. If one of the Respondents loses a customer, Staff argues that it is up to that Respondent to offer services or incentives which will recover the lost revenue. In contrast, Staff contends that Complainants are trying to avoid losing revenue because an end user customer has made a market-based decision. Consequently, Staff avers that Complainants are trying to insulate themselves from competition by obtaining a level of compensation that would negate any revenue loss due to customer choice. Staff, therefore, argues that Complainants' demands for market-based compensation are unpersuasive and misleading and should be rejected.

Staff, meanwhile, asserts that the Commission should employ the cost-based analysis proposed by Staff witness Rettle. While noting that a marginal cost test would be appropriate, Staff recommends the use of a LRSIC standard since the Act specifically condones the use of such a standard for analyzing the prices of competitive services. Section 13-502 (c).

Having neither incremental nor marginal cost data from Complainants, Ms. Rettle considered the cost data of local exchange carriers which provide payphone service. This information was gained from other proceedings ongoing at the Commission.[3] From this information, Ms. Rettle devised a surrogate for the Complainants' LRSIC of operating and maintaining a pay telephone station.

The monthly costs for operating a payphone station included: the payphone, customer-owned payphone line rates, the end user common line charge, screening, outgoing blocking, 9-1-1 surcharge, Illinois Telecommunications Access Corporation surcharge, coin collection, commissions, and sales tax. Ms. Rettle's estimate includes only fixed or non-traffic sensitive costs of operating and maintaining a payphone station. Based on these costs, Ms. Rettle calculated an estimated monthly cost of $89.92. She then assumed that the average payphone is in use for five hours a day. Thus, the average cost per minute was estimated at just under one cent. Then, utilizing the FCC estimate that the average length of a call is five minutes, she calculated the average cost of a call to be approximately $0.05.

F. Complainants' Reply

Complainants initially note that neither MCI nor AT&T presented any evidence as to the appropriate level of compensation. In fact, Complainants assert that MCI is merely using this forum as another opportunity to appeal the FCC's decision regarding the level of compensation for interstate billable operator service calls. Complainants contend that MCI's position should be rejected because the Commission has no jurisdiction over interstate calling issues.

As to their position regarding market value compensation, Complainants continue to assert that the evidence sustains a level which reflects the market value of the service provided. Complainants again point to the fact that their proposed compensation level of $0.85 is the same value which is acceptable to the Respondents. Thus, such a level must be just and reasonable.

Complainants further assert that neither the Respondents nor Staff make a legitimate argument in response to Mr. Segal's market analysis. In response to AT&T's assertions, Complainants contend that the Commission should not look to other jurisdictions in

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[3] Much of the data came from the evidentiary record in Docket No. 88-0412. Most of this information was deemed proprietary in that proceeding and has been accorded like treatment herein. This Order, therefore, refrains from discussing the specifics of such information.

evaluating the appropriate level of compensation. Complainants state that the decisions of other jurisdictions cited by AT&T are inapplicable for a number of reasons. First, those jurisdictions utilize a different standard of compensation for the use of a payphone provider's services or facilities. Second, there was no evidence of either market values or costs of providing services found in those records. In fact, Complainants assert that this Commission has been presented with the most extensive payphone cost information in the country. In conclusion, Complainants argue that the Commission must base its decision on the application of the Act to the facts of this proceeding.

As to the cost data submitted by Complainants' witness Segal, Complainants assert that Respondents' attacks on his competency to testify as an expert witness are facially invalid. Complainants first assert that the Respondents waived their objection to his testimony during the hearings and it is now improper to raise such a question. Complainants, however, argue that Mr. Segal is well qualified. They indicate that his experience includes the fact that he is one of the founders of the competitive payphone industry, his payphone company was the largest non-LEC non-AT&T payphone company in the country and that his firm was the first in Illinois to utilize an OSP other than the LEC to carry operator assisted calls. (Segal Ex. 2.0) Meanwhile, Complainants state that none of Respondents' witnesses has any payphone experience.

As to the specifics of Mr. Segal's cost study, Complainants assert that the study was based upon reliable information which was unrebutted by Respondents. In fact, Complainants argue that Respondents produced no information that is inconsistent with either the basis or results of Mr. Segal's testimony. Consequently, Complainants contend that the Commission must accept his cost study.

Complainants also argue that an LRSIC-based rate standard for competitive services is inappropriate. Complainants contend that the Commission, when setting rates based on cost, should identify the LRSIC and then add an increment to cover common expenses and overhead that are not included in the LRSIC. They further state that the Commission has established no standard as to what increment above LRSIC should be utilized for setting rates. Complainants conclude that Respondents are merely making a hollow argument in favor of cost-based rates, yet provide no explanation as to how this would apply to a competitive service.

Finally, Complainants assert that Mr. Segal's cost study is comparable to Staff witness Rettle's study. The only reason why Respondents accept the Staff study, Complainants contend, is that Respondents are satisfied with the end result. Complainants state that both studies use the same cost elements, while excluding those variable costs associated only with coin calls. Complainants also contend that the results of both studies are very similar and, corroborate each other as to the range of underlying costs. Complainants, however, cite to one flaw in Staff's study. Ms. Rettle estimated that Illinois Bell payphones, which were the subject of her study, were in use approximately five hours per day. Complainants argue that this amount is greatly overstated and point to information from Illinois Bell which reflects dramatically less average usage.[4] When Staff's study is adjusted to reflect actual usage, plus common expenses, Complainants argue that both cost studies produce a cost between $0.33 and $0.50 per call, and that such a rate should serve as a floor for compensation.

G. Commission Conclusion

Section 13-510 gives the Commission wide discretion in evaluating whether, and to what extent, compensation should be given to a payphone provider. Absent an agreement between a payphone provider and a telecommunications carrier which uses the provider's facilities, the language of Section 13-510 authorizes the Commission to act as the sole arbiter for establishing a level of compensation which is just and reasonable. Based on this authority, we now turn to the determination of a just and reasonable level of compensation for Complainants.

1. Billable Operator Service Calls

In assessing this entire matter the Commission must begin its evaluation pursuant to the language of Section 13-510. The language of that Section provides in pertinent part that:

> [a]ny telecommunications carrier using the facilities or services of a payphone provider shall pay the provider just and <u>reasonable compensation</u> for the use of those facilities or services to complete billable operator services calls and for any other use that the Commission determines appropriate consistent with the provisions of this Act. The <u>compensation</u> shall be determined by the Commission subject to the provisions of this Act.

220 ILCS § 5/13-510 (emphasis added) As Staff correctly argued, this Section allows for a payphone provider to be <u>compensated</u> for the use of its facilities and services, rather than allowing the

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[4] Again, the actual figure is proprietary and will not be set forth in this Order.

payphone provider to establish a rate, as rates are contemplated elsewhere in the Act.

Complainants argue that they should be compensated at a market rate for dial-around calls: with the market rate set by utilizing Respondents' OSP rates. This argument is rejected for two reasons. First, the Commission is of the opinion that the General Assembly did not enact Section 13-510 to insure Complainants against lost revenues. Second, Complainants are providing a service which is markedly different from that of Respondents.

As to the first point, Staff is absolutely correct when it asserts that market value compensation would insulate Complainants from the effects of competition. By dialing around a payphone provider's presubscribed operator service, the end user is making a clear choice <u>not</u> to use the presubscribed service. Under Complainants' market value proposal, a payphone provider would receive compensation which is substantially comparable to the compensation received by the firm that actually acted as the OSP. Clearly, such a result runs contrary to any reasoned understanding of competition. There is no reason why the payphone provider should be compensated for dial-around calls at a level comparable to an OSP, when an end user has made a conscious decision, in a competitive market, not to use the payphone provider's presubscribed service.

Section 13-510 does not seek such an outcome. The General Assembly's use of the term "compensation" is a conspicuous departure from the term "rate," which is used extensively throughout the Act. The use of the term compensation recognizes that in this instance payphone providers are a link in the telecommunications chain for the provision of non-presubscribed billable operator service calls. As such, Complainants are not providing a service similar to that of the Respondents, which is the provision of operator services. These payphone providers, therefore, should receive compensation for assisting in the completion of such calls. Such compensation, however, should not be based on the market value of a billable operator service call.

Having rejected the argument that compensation should be based on market value, the Commission now turns to whether compensation can be based on the cost of providing the facilities or services rendered. As discussed hereinabove, both Complainants and Staff presented cost studies in an effort to quantify the cost per call that would be associated with a dial-around call. After reviewing the evidence and the arguments of all the participants, the Commission concludes that Staff's cost study, with one substantial adjustment, should be adopted for the purpose of establishing just and reasonable compensation for the Complainants.

Staff's study acts as a surrogate in an effort to quantify the per call costs associated with a dial-around call. In utilizing information that was part of Illinois Bell Telephone's payphone cost study in Docket 88-0412, the Commission believes that it provides the most comprehensive and reliable information available in this record. Said information is based on audited financial records and reflects a more thorough analysis of the costs of providing the service in question. On balance, therefore, the Commission accepts Staff's surrogate cost study.

Staff's study, however, contains one flaw which must be addressed before the Commission can apply the study properly. This error does not emanate from the Illinois Bell information utilized. Rather, it is the per phone average usage assumption utilized by Staff witness Rettle. Her assumption of an average use of five hours per day does not square with the other evidence which is part of this record. First, Illinois Bell's own cost study utilized an average which was substantially less than Staff's assumption. Second, AT&T witness Scheer testified that at AT&T's busiest payphones, their average per day usage was at a level significantly less than the average proposed by Staff.[5] Consequently, the Commission believes that it must adjust Staff's estimated per day average usage for a payphone.

Based on the evidence, specifically the Illinois Bell and AT&T information, the Commission concludes that an average daily usage of one hour is the appropriate volume upon which to calculate the per call cost of a dial-around call. Modifying Staff's cost study to reflect this change in usage, the Commission concludes that the approximate cost for a dial-around call is $0.25.

Complainants argue that if a cost-based approach is to be used to determine compensation levels, common expenses and overhead should be added to the $0.25 LRSIC total. Complainants contend that they are entitled to some contribution to common expenses and overhead, citing the court opinion in Illinois Bell Telephone Company v. Illinois Commerce Commission, 203 Ill. App. 3d (2nd Dist. 1990), and 220 ILCS 5/13-502(c), 13-507 as requiring some apportionment of common expenses to competitive services.

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[5] The actual average daily usage levels for both Illinois Bell and AT&T are proprietary and, therefore, are not discussed herein.

The Commission rejects Complainants' contention that the Commission has a statutory obligation to add common expenses to LRSIC recovery in this case. The Commission's Order in the remand case and Sections 13-502(c) and 13-507 are limited to circumstances involving carriers that provide both competitive and non-competitive services, and were designed to prevent a supplier from engaging in below-cost pricing by using revenues from a non-competitive service to subsize a competitive service. However, Complainants do not provide non-competitive services, and therefore, these authorities do not apply herein. Thus, the Commission has no mandatory obligation to adopt Complainants' proposal to add common expenses to LRSIC recovery in computing the reasonable level of compensation in this case.

Nevertheless, the Commission concludes that common expenses are a legitimate cost of business. The Commission further concludes that it is within its discretion under Section 13-510 to include an element of common expenses as part of the "just and reasonable compensation" to be paid for use of Complainants' facilities and services.

Complainants identify $0.11 as common expenses which should be added to the .25¢ figure found in the Hearing Examiner's Proposed Order. This figure comes from the record in Docket 88-0412. The added .11¢ would lead to a contribution level of 44% above $0.25. However, as alluded to by Staff Witness Rettle (ICC Staff Ex. 1.0, p.6), common expenses contain some degree of profit. In fact, Complainants' Witness Segal (Complainants' Exh. 3.0, p. 29-30), in recommending that the level of compensation paid to payphone providers be at least 30% above LRSIC, indicates that some profit is included in that contribution. Accordingly, a contribution to common costs of $0.0725, equal to a 30% contribution above the $0.25 LRSIC, leads to a compensation level of $0.325[6], including some unspecified level of profit.

However, the Commission rejects the notion that Complainants are entitled to a contribution to their profitability, beyond the direct cost of providing the service plus common costs. Complainants are entitled to just and reasonable compensation for use of their facilities and services but not to be recompensed for foregone profits when an end-user dials around the OSP of the pay phone provider.

Section 13-510 of the Public Utilities Act confers upon the Commission the authority for determining the reasonable level of compensation herein. Based upon the arguments of the parties and

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[6] (\$0.25)*(.30) + (\$0.25) = \$0.325.

the evidence of record, the Commission believes that a final compensation level of $0.30 is reasonable. A $0.30 compensation level equates to a $0.05 contribution to common expenses which is within the range of the $0.00 recommended by Respondents and the $0.11 identified by Complainants.

The Commission also rejects the arguments of the Respondents relating to the level of compensation that is appropriate. With respect to MCI's assertions, the Commission first notes that the FCC's ruling on the compensation for interstate dial-around calls has no bearing on the level of compensation for intrastate dial-around calls. Consequently, MCI's claims that Complainants already are receiving sufficient compensation due to the FCC's ruling is rejected. As to MCI's and Sprint's argument that Complainants have failed to meet their burden in this matter, the Commission is also unpersuaded. Complainants clearly demonstrated that they were entitled to compensation under the terms of Section 13-510. While the Commission did not accept their proposed level of compensation, the record is more than sufficient to establish the appropriate level of compensation. And, as Section 13-510 provides, it is within the sole discretion of the Commission to establish a just and reasonable compensation level.

Regarding AT&T's and Sprint's arguments, both of these parties suggest that the Commission adopt Staff's recommendation of $0.05 per call. This recommendation, however, does not reflect the adjustment to the per day average usage per phone. As noted above, even AT&T's witness testified that a busy AT&T payphone's per day average usage is considerably less than Staff's proposed average. AT&T and Sprint's positions on this point, therefore, are not adopted.

2. <u>Retail 1-800 Calls</u>

The issue of compensating Complainants for retail 1-800 calls is difficult. Unlike billable operator service calls, retail 1-800 calls are not specifically cited in Section 13-510. Rather, Complainants rely upon the language which provides that:

> [a]ny telecommunications carrier using the facilities or services of a payphone provider shall pay the provider just and reasonable compensation for the use of those facilities or services to complete billable operator services calls <u>and for any other use that the Commission determines appropriate consistent with the provisions of this Act.</u>

220 ILCS § 5/13-510 (emphasis added). However, no other jurisdiction in the country which has addressed this issue has authorized compensation for retail 1-800 calls.

Despite these facts, both Complainants and Staff support the proposition that Complainants should be compensated for retail 1-800 calls. From a technical standpoint, there appears to be no difference between a non-presubscribed operator service call and the retail 1-800 call. Both calls require the use of a payphone provider's services or facilities to complete the call.

Respondents' arguments that these calls should not receive compensation are numerous. Among its arguments, Sprint asserts that Complainants incur no cost for these calls and do not provide a like service. Thus, retail 1-800 calls do not impinge on Complainants' services.

AT&T, meanwhile, argues that such calls should not receive compensation because they are unable to track such calls. In addition, AT&T contends that a retail 1-800 call would not have been handled by the presubscribed OSP. Consequently, AT&T asserts that Complainants are not being deprived of any revenue that they otherwise would have received.

Turning again to Section 13-510, the statutory language discusses compensation for the use of a payphone provider's services or facilities. Clearly, whether a payphone provider is rendering a service similar to that of Respondents is immaterial to the issue of compensation. As examined above, the Commission already has determined that with respect to the types of calls at issue, Complainants are a link in the telecommunications chain which allows such a call to be completed; and, therefore, they should be compensated for the use of their facilities.

The fact that other jurisdictions have rejected compensation for retail 1-800 calls does not persuade this Commission to do the same. Complainants correctly argue that the Commission's focus is limited to intrastate retail 1-800 calls. The General Assembly has established the parameters which the Commission must follow, and neither federal law, nor the laws of the other jurisdictions in question, mirror the language of Section 13-510. Accordingly, those jurisdictions were not bound by the same laws which we must apply. The Commission, therefore, will not use the decisions of other jurisdictions as a basis to reject retail 1-800 compensation.

In weighing this issue, the Commission is of the opinion that Complainants should receive compensation for the use of their services or facilities in the completion of retail 1-800 calls. Staff and Complainants correctly argue that there is no difference between a completed billable operator service call and a completed retail 1-800 call. Under either calling arrangement, Respondents are using Complainants' facilities or services for their benefit. Any other arguments about costs, tracking abilities, or the provision of similar service cannot rebut the fact that Respondents are using Complainants' services or facilities. Under Section 13-510, the Commission concludes that Complainants are entitled to compensation for the use of their services or facilities to complete a retail 1-800 call.

The calculation of what is proper compensation for a retail 1-800 call is a straightforward decision in light of our conclusions above. Staff's recommended compensation amount was equally applicable to both billable operator service calls and retail 1-800 calls. We have determined that, for either type of call, the use of Complainants' services or facilities cannot be distinguished. Therefore, the Commission concludes that Complainants should be compensated at a rate of $0.25 for each completed retail 1-800 call.

V. COMPENSATION TIME PERIOD

The final issue before the Commission is the question of whether the Complainants are entitled to retroactive compensation and, if so, how should that process be administered. Complainants assert that they are entitled to compensation back to October 20, 1990, for the use of Complainants' interconnected services or facilities. To collect amounts for the period prior to the entry of this Order, Complainants suggest that, to the extent possible, actual call volume information should be used. In the event such information is not available, Complainants suggest that compensation be based on a per phone basis, after a three-month study is conducted to calculate the monthly volume of dial-around calls.

Sprint and AT&T argue against any retroactive compensation asserting that it would constitute illegal retroactive ratemaking. Sprint contends that the Commission does not have the authority to order retroactive compensation, and that such compensation is contrary to ratemaking principles in Illinois. See Citizens Utilities Company v. ICC, 529 N.E.2d 510. Sprint asserts that Section 13-510 does not authorize retroactive compensation, and nowhere else in the Act is the Commission empowered to order such relief. Absent such authority, Sprint concludes that the Commission is prohibited from ordering such relief.

AT&T also argues that administration of any retroactive compensation would be very difficult. First, it would be almost impossible to track the actual calls completed. Second, AT&T argues that Complainants' proposed three-month study would be unfair as well. It states that various Complainants blocked their payphones so that an end user could not access the OSP of choice. In fact, they note that several Complainants still had not unblocked their phones by the time the instant complaint was filed. AT&T argues that the Commission should not apply current call volumes to payphones which may have blocked intrastate dial-around calls, and to which there is no way to compare historic volumes.

Staff argues that no compensation should be allowed prior to May 14, 1992, the effective date of Section 13-510. It points to the Hearing Examiner's ruling of February 24, 1993, which rejected Complainants' request for interim compensation, wherein the Hearing Examiner indicated that any award of compensation would be applied from the effective date of the statute. Given said ruling, Staff concludes that it would be inappropriate to apply any level of compensation prior to May 14, 1992.

In reply to Sprint's arguments concerning the Commission's authority to order retroactive compensation, Complainants contend that the court's opinion in Champaign County Telephone Company v. ICC, 37 Ill.2d 312 (1967), requires the Commission to award such compensation. In that case, GTE ceased making certain payments to the complainants as of June 1, 1964. The Commission subsequently entered an order sometime after 1965 which directed GTE to pay the complainants for all toll calls from June 1, 1964 until the date of the order, based upon the rate schedules established in that order. Complainants herein contend that from the Champaign County case, the Commission has the authority to award such retroactive compensation.

Commission Conclusion

The Commission concludes that the Complainants should be given compensation for the use of their services or facilities for the completion of intrastate billable operator service calls, starting May 14, 1992. Prior to that date, Respondents were under no legal obligation to compensate Complainants for the completion of such calls. Thus, compensation for the use of Complainants' facilities or services prior to that date is unwarranted. However, as explained hereafter, the Commission believes that retroactive compensation should not be allowed for retail 1-800 calls.

The arguments alleging a violation of the rules against retroactive ratemaking are not persuasive. This fact situation is in stark contrast to where retroactive ratemaking concerns usually arise. In this instance, Respondents had an obligation as of May 14, 1992, to compensate Complainants for the use of their facilities or services for billable operator services. However, no such compensation was paid. While the proper level of compensation is being set herein, compensation was due since May 14, 1992. Meanwhile, under the usual retroactive ratemaking scenario, there is an attempt made to increase current or proposed rates to offset a revenue shortfall that previously occurred, under rates which were deemed just and reasonable at the time. There, customers were paying the rate which was found to be reasonable, yet they are now being asked to pay an additional increment for that previous time period. The latter scenario is proscribed by law. The former scenario, however, is not retroactive ratemaking. See Champaign County Telephone Company v. ICC, 37 Ill.2d 312 (1967).

In addition to the foregoing, the Commission further believes that it was not the intent of the General Assembly to delay the practical application of Section 13-510. Complainants should not be harmed, nor should Respondents benefit, due to the fact that these parties could not arrive at a level of compensation that was mutually agreed upon. The compensation period began May 14, 1992. Section 13-510 does not subject the receipt of compensation to a condition precedent: whether it be the execution of a compensation agreement between the parties, or the Commission's establishment of a level of compensation. We conclude, therefore, that ordering the Respondents to pay compensation from May 14, 1992, is not violative of the rules against retroactive ratemaking, or contrary to any other section of the Act.

For purposes of analyzing the retroactive compensation issue, the Commission concludes that there is a distinction between billable operator service calls and retail 1-800 calls. Each of the Respondents to this proceeding knew, or should have known, that as of May 14, 1992, a payphone provider which provided services or facilities to complete a billable operator service call was entitled to compensation from the OSP. Such a requirement is distinctly set forth in Section 13-510. The same, however, cannot be said for retail 1-800 calls.

Section 13-510 does not specifically refer to retail 1-800 calls. That section never having been interpreted prior to this Order, the Commission believes that it would be impossible for a party to ascertain with any degree of certainty whether the phrase ". . . for any other use that the Commission determines appropriate consistent with the provisions of this Act[,]" would encompass retail 1-800 calls. Consequently, the Commission concludes that it would be improper to impose upon the Respondents the burden of paying retroactive compensation for retail 1-800 calls, because only by this Order have such calls been included within the scope of Section 13-510. We believe that such an interpretation should be applied only prospectively.

The Commission now turns to the issue of how to compensate Complainants for the use of their services or facilities for completed billable operator service calls prior to the date of this Order. Upon review of the evidence, the Commission concurs with

Complainants that the use of data establishing the actual volume of completed billable operator service calls is the best method for calculating what amount of compensation is due and owing since May 14, 1992. The Commission, therefore, directs Respondents to provide Complainants with all data which identify completed billable operator service calls made from Complainants payphones. From this information, a calculation can be made of what is properly due and owning.

The Commission, however, is cognizant of the fact that it may be impossible for Respondents to provide data for all completed billable operator service calls from May 14, 1992. Notwithstanding this problem, the Commission is not persuaded to utilize Complainants' alternative solution to this dilemma. As AT&T correctly argued, several of the Complainants had their certification revoked during this period, while others programmed their payphones to block intrastate dial-around calls. Clearly, such providers should not be compensated on a per phone basis when there was no way the Respondents could receive a dial-around call from certain of these payphones.

Absent any reasonable solution in the record to resolve the problem of completed, yet unaccounted for, billable operator service calls made prior to the entry of this Order, the Commission directs both Respondents and Complainants to work in concert to resolve this quandary. In light of the Commission's conclusions hereinabove, specifically our conclusions regarding retroactive compensation, it should be clear that only certificated payphone providers, with unblocked payphones, are entitled to compensation. To ensure that Complainants and Respondents work to resolve this matter in a timely fashion, the Commission directs these parties to submit to the Chief Clerk of the Commission, within sixty days from entry of this Order, a report detailing what method[s] will be utilized to comply with our findings and conclusions herein.

VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Complainants are providers of pay telephone services within the State of Illinois;

(2) Respondents are duly certificated telecommunications carriers within the State of Illinois;

(3) the Commission has jurisdiction over the parties and the subject matter of this proceeding;

(4) the findings of fact and conclusions of law set forth in the prefatory portion of this Order are hereby adopted as findings of fact and conclusions of law;

(5) pursuant to Section 13-510 of the Act, Complainants are entitled to compensation for the use of their facilities or services for the completion of intrastate billable operator service calls and retail 1-800 calls;

(6) the per call method of compensation should be utilized to measure the amount of compensation due and owning Complainants;

(7) the just and reasonable level of compensation is set at $0.30 per call for both billable operator service calls and retail 1-800 calls; this level of compensation is based an application of Staff's surrogate cost study, as modified by this Order;

(8) Complainants are entitled to retroactive compensation for billable operator service calls back to May 14, 1992; Complainants are not entitled to retroactive compensation for retail 1-800 calls;

(9) that all motions or objections not heretofore disposed of should be disposed of in a manner consistent with the findings and conclusions of this Order;

(10) that the instant complaint is granted in part and denied in part.

IT IS THEREFORE ORDERED that the compliant filed on October 23, 1992, by the above-captioned Complainants be, and is hereby, granted in part and denied in part.

IT IS FURTHER ORDERED that Complainants are entitled to, on a prospective basis, compensation at the rate of $0.30 per completed call, for billable operator service calls and retail 1-800 calls.

IT IS FURTHER ORDERED that Complainants are entitled to retroactive compensation at the rate of $0.30 per completed call, starting May 14, 1992 and ending on the date of this Order, for billable operator service calls only. Complainants are not entitled to compensation for retail 1-800 calls completed prior to the date of this Order.

IT IS FURTHER ORDERED that the Commission directs the Complainants and Respondents to submit to the Chief Clerk of the Commission, within sixty days from entry of this Order, a report